

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

BASF AGRO B.V., ARNHEM (NL),  
WÄDENSWIL BRANCH, BAYER S.A.S.,  
and MERIAL LIMITED,

Plaintiffs,

v.

CHEMINOVA, INC.,

Defendant.

C.A. No. 10-CV-274-WO-WWD

**PLAINTIFFS' MOTION TO DISMISS ALL PENDING  
CLAIMS, DEFENSES, AND COUNTERCLAIMS RELATING  
TO U.S. PATENT NO. 6,881,848 PURSUANT TO FED. R. CIV. P. 41(a)(2)**

Plaintiffs, BASF AGRO B.V., ARNHEM (NL), WÄDENSWIL BRANCH (“BASF”), BAYER S.A.S. (“Bayer”) and MERIAL LIMITED, (“Merial”) (collectively, “Plaintiffs”) move the Court pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure to dismiss, with prejudice, all pending claims, defenses, and counterclaims relating to U.S. Patent 6,881,848 (“the ‘848 Patent”) with respect to Cheminova’s process for the manufacture of fipronil technical product as set forth in deposition exhibits PX 23 (CHEM 355200-218) and PX 92 (CHEM 365571-366409) and Defendant’s September

30, 2010 Amended and Supplemental Objections and Responses to Plaintiffs' First Set of Interrogatories ("Cheminova's Current Process").

In support of this Motion, Plaintiffs state as follows:

1. On April 8, 2010, BASF and Bayer filed a Complaint alleging, *inter alia*, that Cheminova, Inc. ("Cheminova") infringes the '848 Patent. (See Count IV at ¶¶ 57-60 [D.I. 1]).

2. On October 15, 2010, Plaintiffs filed an Amended Complaint alleging, *inter alia*, that Cheminova infringes the '848 Patent. (See Count IV at ¶¶ 63-66 [D.I. 50]).

3. On October 29, 2010, Cheminova filed an Amended Answer, Affirmative Defenses, and Counterclaims to Plaintiffs' Amended Complaint. [D.I. 57]. In it, Cheminova asserted defenses and counterclaims related to the '848 Patent. (See Answer at ¶¶ 63-66 [D.I. 57]; Affirmative Defenses at ¶ 68 [D.I. 57]; Counterclaim Count 1 at ¶¶ 10, 11, 12, and 14 [D.I. 57]).

4. BASF and Bayer served their First Set of Interrogatories on Cheminova on May 24, 2010. Cheminova served responses and amended and supplemental responses to these interrogatories on July 9, 2010, September 30, 2010, November 30, 2010, and April 21, 2011 (collectively, "Interrogatory Responses"). In its Interrogatory Responses, Cheminova described the process by which it manufactures fipronil.

5. On February 28, 2011 Cheminova first made available a corporate witness for a deposition regarding the portion of Cheminova's Current Process that relates to the

‘848 Patent.<sup>1</sup> Shortly beforehand, Cheminova produced, for the first time, process batch records relating to this portion of Cheminova’s Current Process. Subsequent to that deposition and production, on April 19, 2011, counsel for BASF alerted counsel for Cheminova that it would withdraw the ‘848 Patent from the case.

6. Based on its representations regarding Cheminova’s Current Process for the manufacture of fipronil technical product (as identified in deposition exhibits PX 23 (CHEM 355200-218) and PX 92 (CHEM 365571-366409) and Defendant’s September 30, 2010 Amended and Supplemental Objections and Responses to Plaintiffs’ First Set of Interrogatories), Plaintiffs hereby seek to dismiss with prejudice all pending claims, defenses and counterclaims relating to the ‘848 Patent as against Cheminova’s Current Process.

Plaintiffs further rely on Plaintiffs’ Memorandum of Law, filed herewith.

WHEREFORE, Plaintiffs respectfully move this Court to dismiss, with prejudice, all claims, defenses, and counterclaims relating to the ‘848 Patent as to Cheminova’s Current Process and that such dismissal be without prejudice with respect to any other process of manufacturing fipronil technical material employed by or for Cheminova, previously or in the future.

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<sup>1</sup> On December 1, 2010, Cheminova first made available a corporate witness on its process. However, he was unprepared to testify regarding the portion of the process that is the subject of the ‘848 Patent. Nor had Cheminova collected documents relating to this portion of the process at this time, despite numerous prior requests for production.

Respectfully submitted this 17th day of June, 2011.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants: Daniel Alan M. Ruley, [aruley@belldavispiatt.com](mailto:aruley@belldavispiatt.com), William K. Davis, [wdavis@belldavispiatt.com](mailto:wdavis@belldavispiatt.com), Christopher G. Kelly, [christopher.kelly@hklaw.com](mailto:christopher.kelly@hklaw.com), Steven L. D'Alessandro, [steven.dalessandro@hklaw.com](mailto:steven.dalessandro@hklaw.com), Robert J. Burns, [robert.burns@hklaw.com](mailto:robert.burns@hklaw.com), Joshua C. Krumholz, [Joshua.krumholz@hklaw.com](mailto:Joshua.krumholz@hklaw.com), Jitendra Malik, [jmalik@alston.com](mailto:jmalik@alston.com), John Patrick Elsevier, [jpelsevier@jonesday.com](mailto:jpelsevier@jonesday.com), Matthew W. Howell, [matthew.howell@alston.com](mailto:matthew.howell@alston.com), Judy C. Jarecki-Black, [jduy.jarecki@merial.com](mailto:jduy.jarecki@merial.com), and Frank G. Smith, [frank.smith@alston.com](mailto:frank.smith@alston.com).

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